

To: Mr. Jeffrey C. Berg
Acting Director
Community Development Financial Institutions Fund

From: Mr. John Beirise
Native American National Bank

Date: July 2, 2001

Re: Comments on Guidance, New Markets Tax Credit, 66 Fed. Reg. 21,846 (2001) (the "Guidance").

These comments are presented on behalf of the Native American National Bank ("NANB" or the "Bank"), headquartered in Denver, Colorado, the only bank in the United States that is owned primarily by multiple Native American Tribes (including both U.S. and Canadian Tribes) and Alaska Native Corporations ("ANCs"). As such, the Bank will be uniquely qualified and focused on community development and economic empowerment for Native American and Alaska Native communities throughout the United States (collectively, "Indian Country"). The Bank will have the resources and the commitment to target American Indian and Alaskan Native businesses and entities, and to develop the technical expertise to address the special legal issues arising from doing business with these customers.

The Bank's mission is to be a powerful engine for American Indian economic expansion in the Indian Country financial marketplace; help project the growing economic power of Tribe, ANC, Alaskan Native Villages and their businesses into the national scene; build the economic and financial power of Indian Country through improved access to capital, investments, information, business intelligence, and financial markets; and assist in meeting the economic, community development, housing and infrastructure needs of American Indians and Alaskan Natives.

The corporate objectives of the Bank are to: invest in qualified low income community investments ("QLIIs"); seek to produce favorable long-term returns on investors' capital; become a premier provider, both directly and as agent/facilitator, of financial services to Indian Country; serve as a wholesale conduit and bridge to the financial markets for Indian Country; improve access to capital, investment opportunities, business intelligence, information and decision-makers for the benefit of the Bank's customers and investors; serve as a center of expertise in financing for Indian Country; and provide development finance services to Tribes, ANCs and their businesses, including packaging private and government credit programs, as well as community development finance.

The Bank's charter, under which it was designated as a "community development financial institution" ("CDFI"), will be converted to a national charter in the very near future. Thereafter, NANB will seek to remain qualified as a CDFI under 12 U.S.C. §§ 4701 et seq.

The core banking functions of NANB will provide Indian Country with a commercial bank that is expert in the unique aspects of doing business in Indian Country and in addressing matters involving tribal sovereign immunity, tribal courts, trust lands and other special aspects of lending in Indian Country. NANB will be a business bank that focuses on large commercial, tribal and corporate loans and that endeavors to break down the barriers that have caused Indian Country to be vastly

under-served by the banking industry. Over time, it is anticipated that NANB will open branches on reservations and assist Tribes in establishing Tribally-owned banks.

The most significant component of the core banking functions will be making loans. Funding for these loans will come from borrowings in the capital markets and deposits made by Tribes, major ANCs, corporations and foundations that are interested in making deposits in minority-owned banks, large banks that either have substantial business interests in Indian Country or seek Community Reinvestment Act compliance, and federal agencies.

One of the motivating purposes behind the establishment of NANB is to address the shortage of credit and other financial services provided to reservations and Alaska Native communities. NANB will provide expertise to handle the unique aspects of lending in Indian Country – mortgages on trust land, tribal courts, tribal sovereign immunity – and the many other issues that other financial institutions have been reluctant to spend the time to learn about and which are used as reasons for not serving Indian country.

Congress, through the passage of the 1994 Reigle Community Development and Regulatory Improvement Act, authorized the development of the Native American Lending Study/Action Plan (the “Action Plan”). The Action Plan authorized the CDFI Fund to identify barriers in Indian Country to private financing; identify impacts of such barriers on access to capital and credit for Native American populations; recommend necessary statutory and regulatory changes to existing federal programs; make appropriate policy recommendations; and submit a final report to the President and Congress. Unfortunately, the Action Plan was never implemented by the CDFI Fund. As a result, Indian Country remains an area lacking in detailed financial information and analysis which only serves to further its economic isolation from mainstream sources of investment.

In response to the Guidance, these comments address certain issues concerning the allocation of New Markets Tax Credits (“NMTCs”) to an applying Community Development Entity (“CDE” or “Applicant”).

1. ***IRC 45D(f)(2) requires that in making allocations of NMTCs, priority be given to (a) any applicant that has a record of having successfully provided capital or technical assistance to disadvantaged businesses or communities or (b) any Applicant which intends to satisfy the Substantially All Test by making Qualified Low-Income Community Investments (QLIIs) in one or more businesses in which persons unrelated to the CDE hold a majority equity interest.***

- (a) ***How should the Fund implement this policy? For instance, should the Fund incorporate preference points into the scoring? Should the Fund make awards to organizations that are deemed competitive and meet one or both of these criteria before providing an allocation to any other applicant?***

These provisions are designed to ensure that NMTC allocations result in the flow of capital to a range of qualified opportunities in low income communities. While, giving priority in the allocation of NMTC’s to Applicants based upon the Applicant’s institutional investment and community development track record may make sense, NANB objects to this approach in that it places de novo or first time lenders of investment capital to low-income communities at a significant disadvantage. The NANB is unique in that its primary purpose

is to bring financial services to Indian Country which, as acknowledged by the 1994 statutory creation of the CDFI Fund, is an area traditionally underserved by financial lenders. The NANB, and Indian Country for that matter, should not be penalized or disqualified based on the fact that the Bank has yet to commence making QLII's.

If an Applicant is a first time lender with no developed track record of institutional investment or community development, the evaluation for the allocation of NMTCs should be based upon the Applicant's intention to make "Substantially All" of its QLII's in one or more businesses in which persons with a majority equity interest in the business are unrelated to the Applicant CDE.

(b) What specific factors should the Fund consider when evaluating whether an applicant meets the requirements for priority treatment?

The CDFI Fund should gauge intention to make QLII's in one or more businesses in which persons unrelated to the CDE hold majority equity interest by looking at: (i) the ability of the Applicant to find viable opportunities in Low Income Communities such as Indian Country which has nearly always been overlooked by traditional investors; (ii) projected community development activities and projected impact; (iii) uniqueness of the Applicant's business plan; and (iv) qualifications of the Applicant's staff to generate and meet demand for a significant volume of QLII's.

(c) Should more weight be given to one priority category over the other and should an applicant be allowed to receive preference points under both priority categories.

More weight should be given to one priority category over the other in certain situations. Applicants which are de novo or first time lenders should not be penalized or disqualified based on the fact that they do not yet have a record of institutional investment or community development. Especially when the Applicant is a do novo or first time lender in such a needy area as Indian Country, the evaluation for the allocation of NMTCs should be based upon the Applicant's intention of meeting the Substantially All Test through making QLII's in one or more businesses in which persons who hold a majority equity interest are unrelated to the CDE/CDFI serving a unique and needy area as Indian Country.

2. Should there be limits as to the amount of a NMTC allocation that may be awarded to an applicant in a calendar year?

It is important to demonstrate qualified demand for NMTCs in the early years of program operation. Therefore, in the early years of the program, NANB does not recommend limits on the annual amount of NMTC allocation for any applicant. Early market experience will indicate whether limits are needed to ensure that the credits flow to a range of CDE types and markets.

In addition to the questions above, NANB has the following concerns regarding the process outlined in the CDFI Fund's Guidance:

Allocation Application and Allocation Agreement Procedures. The Application process for tax credit allocations requires the CDE to supply a Comprehensive Investment Plan that provides historical information and a minimum five-year investment strategy. CDEs receiving NMTC allocations must enter into an Allocation Agreement with the CDFI Fund. There is substantial investor and CDFI practitioner concern that both the Application and Allocation Agreement processes will be onerous, substantially delay the availability of NMTCs, and potentially impede market-driven transactions from being able to take advantage of the NMTCs as intended. There are also investor concerns that a CDE's unintentional violation of an Allocation Agreement due to failure to meet certain performance criteria might trigger recapture, even where there is no bad faith. Investors and CDFI practitioners have indicated that, if recapture were to be triggered by violations of individualized Allocation Agreements, there might not be a uniform standard or recapture or rational means for managing recapture risk. Finally, there is concern that Allocation Agreements might constrain a CDE's flexibility to adjust its business plan or geographic focus as needed to respond to market forces and remain successful over time.

Recommendations:

The NANB urges elimination of the Allocation Agreement and incorporation of necessary reporting requirements from CDEs in the Notice of Allocation Availability and in the NMTC application itself, so that nothing remains to be negotiated after a CDE receives a tax credit allocation.

If there must be an Allocation Agreement, a boilerplate document should be created that focuses on the mechanics of tax credit allocation and reporting, rather than financial, development impact, business or geographic targets. (The matter of overriding concern with respect to NMTC, the CDE's obligation to meet the "substantially all" test, should be addressed in agreements with investors and in an annual compliance statement to the IRS.) Further, a process should be created to ensure that a CDE does not trigger recapture through violation of its Allocation Agreement, unless there is bad faith.

Ample time should be allowed between the filing of an Application to the completion of an Allocation Agreement and receipt of NMTC allocations, but some time less than one year.

A streamlined application process should be developed for CDEs that have already submitted a Comprehensive Investment Plan for a similar NMTC business model, or a relevant Comprehensive Business Plan under any other CDFI Fund program.

Availability of Bank Enterprise Award monies for a) bank investments into CDEs, and b) Qualified Low Income Community Investments by banks that are CDEs. There is precedent in the combination of Low Income Housing Tax Credits and Historic Preservation Tax Credits for the use of two sets of Federal resources simultaneously to accomplish a community development purpose. The markets served by QLII's under NMTC have long deferred investment and credit needs. Meeting these needs will most rapidly and reliably be accomplished by allowing the BEA incentive along with NMTC. Furthermore, the census tracts that qualify for BEA purposes are more restrictive than the census tracts that qualify for NMTC purposes. Thus, there is a strong policy rationale for providing additional subsidies for the "poorest of the poor" census tracts, such as found in Indian country, that are the most difficult to serve.

Recommendation: Bank investments into CDEs, and QLIIIs by banks that are CDEs, should be eligible for Bank Enterprise Awards.